IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 382 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? NO

2. To be referred to the Reporter or not? NO

3. Whether Their Lordships wish to see the fair copy of the judgement? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder ? NO

5. Whether it is to be circulated to the Civil Judge? NO

MOHMAD ILIAS UMARMIYA SHEIKH

Versus

STATE OF GUJARAT

Appearance:

MR MM JADEJA for Petitioner
MR ST MEHTA PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

Date of decision: 01/07/96

ORAL JUDGMENT {Per : HR Shelat, J.}

The Appellant, through this appeal, calls in question the judgment dated 31st March, 1992 rendered by the then learned Principal Judge, City Sessions Court, Ahmedabad, in Sessions Case No. 313 of 1988 convicting

him of the offences under Section 20 (B)(2) of the Narcotic Drugs & Psychotropic Substances Act, 1985 {for short "the Act"} and section 66 (1)(b) of the Bombay Prohibition Act, and sentencing him to undergo rigorous imprisonment for 10 years and fine of Rs. 1,00,000/=, in default r.i. for three years more for the offence under section 20 (B)(2) of the Act and r.i. for three months and fine of Rs. 500/-; in default, r.i. for one month more, for the offence under section 66 (1)(b) of the Bombay Prohibition Act.

2. The case of the prosecution may in brief be stated. The Head constable Nanusinh at the relevant time serving at Kalupur Police Station, Ahmedabad received the information that the appellant near Premdarwaja was dealing in "charas". He therefore went to Premdarwaja, Vaghrivas-naka alongwith the members of the police staff. On way to Premdarwaja, he also summoned the panchas. After he reached Premdarwaja, the appellant was identified. He was then intercepted and his search was taken. From the pocket of the Kurta (gown) he had put on, 20 grams of charas to the tune of Rs. 70/= was found. He was having no pass or permit to possess the same. It was found that the appellant had committed the offences stated hereinabove. He was then arrested. The charas was seized and undergoing necessary formalities, the same was sealed. A panchnama thereof was also drawn and the complaint came to be lodged before the Kalupur Police Station. The Police officer then took the investigation on hand. At the conclusion of the investigation, a chargesheet against the appellant was presented before the Court of the Metropolitan Magistrate at Ahmedabad. As he was not competent to hear and decide the case, he committed the case to the City Sessions Court at Ahmedabad. That case was registered as Sessions Case No. 313 of 1988. The then learned Principal Judge of the City Sessions Court framed the charge Exh. 1 against the appellant, to which he pleaded not guilty and claimed to be tried. The prosecution then led necessary evidence. Appreciating the evidence on record, the learned Judge below reached the conclusion that the prosecution had succeeded in establishing the charge beyond reasonable doubt. He, therefore, held the appellant guilty and sentenced him, as aforesaid. It is against that judgment and order, the present appeal has been filed.

3. The learned counsel representing the appellant assailed the judgment and order of the lower court on different grounds but at the time of hearing, he taperred off his submissions and confined to Section 50 of the

Act. According to him, the mandatory provisions of Section 50 of the Act was violated. The appellant was not given an opportunity of being searched in the presence of gazetted officer or the Magistrate. Non-compliance of Section 50 was, therefore, fatal to the prosecution, and on that count alone, the appellant was entitled to acquittal.

4. The learned APP against such a submission argued that the approach of the Court must be pragmatic and must be meaningful so that the object of the Act might not be frustrated.

5. We may deal with submission of the learned APP first. No doubt, the approach of the Court should be promotive to the object of the Act. But if the approach of the Court is consistent with law and binding case-law, may be impalatable to the party or others, it cannot be stamped unpragmatic and defeating the object of the Act.

6. Here in this case, non-compliance of Section 50 of the Act is alleged. As per section 50, the mandatory provision, it is incumbent upon the officer taking search of accused to afford an opportunity of being searched either in the presence of a gazetted officer or a Magistrate. If that opportunity is not given, there would be non-compliance of Section 50 which is fatal to the prosecution. Even no presumption that the official Act must have been performed as per law can be raised. Hence about affording of the opportunity to the accused, presumption thereof has no scope. For our such view, a reference of the case of State vs. Balbirsingh, 36 (2) GLR 1315 may be made.

7. In this case, we have scanned the evidence on record. The FIR is produced at Exh. 13. Nowhere it is mentioned therein that the opportunity of being searched in the presence of a gazetted officer or a magistrate as mandated by Section 50 was given to the appellant is mentioned. Likewise, the Panchnama Exh. 26 is also silent. The Panch, Sailesh Dilipbhai is examined at Exh. 24. He also does not say about the opportunity having been given to the appellant. The officer making search (Mr. N.R Chauhan) is examined at Exh. 12. He is also silent on the point. Thus, on record, there is not an iota of evidence indicating that the opportunity to the appellant of being searched in the presence of a gazetted officer or a magistrate was given. On query, Mr. Mehta, the learned APP laboured much but failed to point out anything from the record indicating about the opportunity having been given to the appellant. When that is so, we

agree with the submission made on behalf of the appellant and hold that the investigating agency has committed the breach of Sectiion 50. Consequently, the prosecution with regards to Section 20 (B)(2) of the Act must fail. The appellant is therefore entitled to acquittal so far as offences under Section 20(B)(2) of the Act is concerned.

8. The appellant is also convicted of the offences under Section 66 (1)(b) of the Bombay Prohibition Act. So far as that Act and offence under that Act is concerned, the benefit the appellant is getting because of non-compliance of Section 50 of the Act, is not available to him under the Bombay Prohibition Act. Hence, considering the materials on record, we find that the evidence is credible and cogent and is free from doubts. It inspires confidence and goes to show that the charge against the appellant so far it relates to Section 66 (1)(b) of the Bombay Prohibition Act is established beyond reasonable doubt. The learned advocate representing the appellant could not point out from the record any infirmity which would lead us to upset the finding in that regard.

9. For the foregoing reasons, this Appeal requires to be partly allowed. We accordingly allow the appeal partly and set-aside the conviction and sentence inflicted on the appellant with regard to the offence under Section 20 (B)(2) of the NDPS Act and acquit the appellant thereof. The conviction and sentence with regard to the offence under Section 66 (1)(b) of the Bombay Prohibition Act are hereby confirmed.

10. The appellant is in jail right fro m 12th October, 1992. By the time, he has served-out the sentence awarded. He be therefore set at liberty forthwith; if no longer required in any other case. Fine, if paid, be refunded to the appellant.

11. Muddamal be disposed of as directed by the lower court.

****

Prakash*